

Editor's note: appealed -- aff'd, Civ. No. C82-1164 J (D. Utah 1985); aff'd, No. 83-2214 (10th Cir. Aug. 7, 1985) 769 F.2d 668

JUSTHEIM PETROLEUM CO.

IBLA 82-683

Decided September 8, 1982

Appeal from decision of Utah State Office, Bureau of Land Management, rejecting oil and gas lease offers U-26485, U-26504, and U-26505.

Affirmed.

1. Mineral Leasing Act: Generally -- Mineral Leasing Act: Combined Hydrocarbon Leases -- Mineral Leasing Act: Lands Subject to -- Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Competitive Leases -- Oil and Gas Leases: Lands Subject to -- Tar Sands

The Combined Hydrocarbon Leasing Act of 1981, P.L. 97-78, 95 Stat. 1070, amended the Mineral Leasing Act of 1920, sec. 17(b), 30 U.S.C. § 226(b) (1976), to require competitive bidding in the leasing of lands within special tar sand areas, and a noncompetitive oil and gas lease offer for a parcel within a designated tar sand area must be rejected after enactment of the amendment, notwithstanding the fact that the offer was filed prior to the passage of the legislation.

2. Federal Employees and Officers: Authority to Bind Government -- Mineral Leasing Act: Generally -- Mineral Leasing Act: Combined Hydrocarbon Leases -- Oil and Gas Leases: Application: Generally -- Oil and Gas Leases: Competitive Leases: Oil and Gas Leases: Discretion to Lease -- Secretary of the Interior -- Tar Sands

An applicant for a noncompetitive Federal oil and gas lease has no rights in the land or its minerals until the lease is lawfully issued to him. The Secretary of

the Interior has discretionary power to lease or refrain from leasing those Federal lands which are otherwise available on a noncompetitive basis. Where the Assistant Secretary directs that leases be issued in response to certain pending noncompetitive offers, but the status of the subject lands is subsequently altered by new legislation which requires that they be leased only by competitive bidding, the discretionary authority to lease such land noncompetitively is vitiated, and the Bureau of Land Management is legally disabled to implement the directive thereafter.

APPEARANCES: Frank J. Allen, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Justheim Petroleum Company appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated March 5, 1982, rejecting appellant's noncompetitive oil and gas lease offers U-26485, U-26504, and U-26505 because the lands included in these offers are within the PR Spring Designated Tar Sand Area, established September 23, 1980. Under the Combined Hydrocarbon Leasing Act of 1981 (CHLA), P.L. 97-78 (Nov. 16, 1981), lands within a designated tar sand area can only be leased by competitive bidding.

Appellant filed these offers with BLM on June 10, 1974. On July 2, 1974, BLM issued a decision rejecting these offers in part because the offers included certain lands in prior State selection applications and Utah's Division of State Lands opposed the issuance of the leases. BLM stated that action on these lands would be held in abeyance for 1 year, and if the State selections were still pending at that time, the cases of the oil and gas offers to lease would be closed. This was confirmed in another BLM decision issued July 18, 1974. Appellant filed an appeal with this Board. The Board issued its decision, Justheim Petroleum Co., 18 IBLA 423 (1975), holding that the offers would be suspended until such time as the State selection applications were judicially resolved. In Andrus v. Utah, 446 U.S. 500 (1980), decided May 19, 1980, the United States Supreme Court held that the Secretary of the Interior had the right to refuse certain State selections. The effect of this decision was to deny the State the right to select property covered by appellant's offers.

On August 26, 1980, then Under Secretary Joseph issued a directive to BLM to temporarily stop issuance of noncompetitive oil and gas leases in certain lands in eastern Utah identified as designated tar sand areas (DTSA). On May 28, 1981, Assistant Secretary Carruthers issued a memorandum to the Director, BLM. ^{1/} The memorandum discussed the August 26, 1980, directive

^{1/} The distribution list shows that a copy of this memorandum was sent to BLM's Utah State Director.

of former Under Secretary Joseph to suspend issuance of noncompetitive oil and gas leases in DTSA's, and indicated general continuing support for that policy and its objectives. However, the last paragraph of the Assistant Secretary's memorandum addressed the disposition of one particular group of oil and gas lease offers which had not been specifically dealt with in the directive by former Under Secretary Joseph. That paragraph states:

We continue to remain interested in preserving the opportunity to issue tar sand leases without encumbering oil and gas leases in the same acreage. Even so, there are a small number of oil and gas lease applicants whose offers were submitted prior to August 26, 1980, but whose leases have not been issued because of the Under Secretary's directive. In the interests of equity, [2/] please direct the Utah State Office to proceed with issuance of oil and gas leases in DTSA's applied for prior to August 26, 1980. Disposition of applications received on or after that date will await further policy review.

Appellant's oil and gas lease offers, having been filed on June 10, 1974, would have been included in the group to be issued leases pursuant to this instruction. However, before any action was taken by BLM with respect thereto, the Congress enacted H.R. 3975 as the CHLA, supra, which was signed by the President on November 16, 1981. That legislation amended numerous sections of the Mineral Lands Leasing Act of 1920, so as to provide for the issuance of "combined hydrocarbon leases" in designated special tar sands areas, such leases to encompass as "oil" all "nongaseous hydrocarbon substances other than those leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons)." The amendment also required that lands in special tar sand areas "shall be leased to the highest responsible qualified bidder by competitive bidding."

On March 5, 1982, BLM issued its decision rejecting appellant's lease offers for lands within the PR Spring Designated Tar Sand Area because "[t]he Combined Hydrocarbon Leasing Act, Public Law 97-78, effective November 16, 1981, provided that lands within a designated tar sand area can only be leased by competitive bidding."

Is its statement of reasons, appellant contends that once a final determination was made in Andrus v. Utah, supra, and the State had no right to select the lands covered by appellant's offers, the leases should have immediately issued, inasmuch as appellant met all the requirements of the law. Appellant reasons that a decision not to issue the leases, based on the passage of an Act almost 2 years after the court decision, has the effect of

2/ It is apparent that the Assistant Secretary's employment of the term "equity" in this context was synonymous with conceptual "fairness" rather than an acknowledgment of any equitable interest, title, claim, or right which could be recognized by a court. A long history of Departmental and judicial precedent has firmly established that the mere filing of an oil and gas lease offer or application does not invest the applicant with any judicially cognizable equitable claim to receive a lease. See discussion in text, infra.

imposing an ex post facto law. Appellant further contends that there is inequity in failing to issue the leases based upon the law in effect at the time appellant's applications were received for approval. Appellant refers to the memorandum of May 28, 1981, which directs the Utah State Office to proceed with issuance of oil and gas leases in DTSA's applied for prior to August 26, 1980.

The Secretary of the Interior is invested by the Mineral Leasing Act of 1920 with discretionary authority to lease or not to lease Federal public land which is otherwise available for oil and gas leasing. 30 U.S.C. § 226(a) (1976); Udall v. Tallman, 380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1965); Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969); Haley v. Seaton, 281 F.2d 620, 624-25 (D.C. Cir. 1960); Natural Gas Corp. of California, 59 IBLA 348 (1981), and cases cited therein. The mere fact that appellant's oil and gas lease offers were pending at a time when the land was available for leasing does not invest the offeror with any legal or equitable title, claim, interest, or right to receive the lease where, during the pendency of the offer, the land becomes unavailable to such leasing either by reason of the exercise of Secretarial discretion or by operation of law. The offer to lease is a hope, or expectation, rather than a valid claim against the Government. Udall v. Tallman, *supra*; McTiernan v. Franklin, 508 F.2d 885, 888 (10th Cir. 1975); Schraier v. Hickel, *supra*; D. R. Gaither, 32 IBLA 106 (1977), aff'd sub nom. Rowell v. Andrus, Civ. No. 77-0106 (D. Utah Apr. 3, 1977); Duncan Miller, 20 IBLA 1, appeal dismissed, Miller v. Secretary of the Interior, Civ. No. 75-0905 (D.D.C. Sept. 2, 1975).

Beyond the question of Secretarial discretion, ultimate control of the disposition of public lands and resources belongs to Congress, and the responsibility of the Department of the Interior is to administer them in accordance with the dictates of the legislative branch. Since appellant's lease offers were still pending on the date CHLA took effect; and were nonconforming thereunder, they must be rejected. No oil and gas leases may issue to appellant on its oil and gas lease offers, because the lands requested are within a special tar sand area, which is leasable only through competitive bidding. Daniel A. Engelhardt (On Reconsideration), 62 IBLA 93, 89 I.D. 82 (1982).

Failure to issue the leases on the ground that the Act prohibits such issuance does not impose an ex post facto law. Section 4 of CHLA, states that "[t]he term 'combined hydrocarbon lease' shall refer to a lease issued in a special tar sand area pursuant to section 17 after the date of enactment of the Combined Hydrocarbon Leasing Act of 1981." (Emphasis added.) The Act does not provide any deference for lease offers pending prior to the passage of the Act. Section 8 of CHLA also clearly implies that CHLA applies to all leases not outstanding on November 16, 1981. Since appellant had only lease offers prior to the passage of CHLA, any leases issued to it after the date of passage must be in accordance with CHLA.

Appellant contends that it is inequitable not to issue the leases in accordance with the law in effect at the time that its offers were reviewed for approval. Appellant specifically refers to Assistant Secretary Carruthers' memorandum of May 28, 1981, directing BLM to proceed with issuance of oil and gas leases in DTSA's applied for prior to August 26,

1980. The delegation of authority to the Assistant Secretary of the Interior is set forth in the Departmental Manual at page 210, section 1.2, which, inter alia, provides that "the Assistant Secretaries severally are authorized to exercise all of the authority of the Secretary." Thus, given the status of the public lands at issue at that time, the Assistant Secretary was entirely within the scope of his delegated discretionary authority on May 28, 1981, when he directed that leases be issued in response to these offers. Had BLM acted immediately to issue the leases they would have been prima facie valid instruments and, having been issued at the direction of the Assistant Secretary, beyond the review jurisdiction of this Board. Blue Star, Inc., 41 IBLA 333, 335 (1979). However, in the present posture of the case, it is not the order of the Assistant Secretary which is the subject of this appeal but, rather, the decision of officials of BLM, concerning which this Board has specific jurisdiction. 43 CFR 4.1(b); 43 CFR 4.410.

The failure of BLM to act on the subject noncompetitive oil and gas lease offers until after enactment of the CHLA, precluded the BLM from lawfully issuing the leases thereafter. The Act changed the status of the land within the special tar sand areas designated, and foreclosed their availability to the issuance of noncompetitive oil and gas leases as a matter of law. Larry E. Clark, 66 IBLA 23, 28 (1982). Therefore, BLM properly rejected appellant's oil and gas lease offers.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

